No. 78421-3

MADSEN, J. (concurring/dissenting)—The purpose of the tort claim for wrongful discharge in violation of public policy is to protect a clearly existing public policy mandate, not create one. At all times relevant to this case, Washington law did not require private employers to grant leave to domestic violence victims for the purpose of seeking legal, medical, and social services. *After* this court took review, our legislature enacted legislation that expressly creates the public policy mandate the petitioners ask us to recognize as a matter of common law. *See* Substitute H.B. 2602, 60th Leg., Reg. Sess. § 1(1) (Wash. 2008). In my view, the lead and concurring opinions improperly give retroactive effect to the new legislation, inferring a "clear mandate" of public policy from a statute that did not exist at the time this suit was instituted. Imposing tort liability based on later announced public policy defeats a central purpose of the clarity element, which is to ensure an employer has fair notice of practices that violate public policy.

The lead opinion avoids this inconvenient fact by reformulating the certified question to address only whether Washington has a clearly established public policy of preventing domestic violence, not whether public policy clearly requires employers to grant leave to domestic violence victims. Yet the lead opinion implicitly imposes a broad new duty on employers to excuse any employee absenteeism resulting from domestic violence that a jury finds to have been "reasonably necessary." This represents an unprecedented expansion of the public policy tort.

We should hold that at the time Laidlaw Transit Services discharged Ramona Danny, public policy clearly prohibited an employer from discharging an employee because of his or her status as a domestic violence victim or because the employee obtained a protection order, assisted the prosecution of the perpetrator, removed children from an abusive environment, and/or accessed services for domestic violence victims. However, then-existing public policy did not forbid employers from discharging an employee due to absenteeism resulting from domestic violence, except to the extent a statutory or contractual right to protected leave applied. Discharging an employee for missing work is different from discharging an employee for the conduct she engages in while she is gone from work. Unlike the legislatures of most other states, our legislature had not yet enacted legislation requiring employers to grant leave to domestic violence victims, and it is inappropriate for this court to impose such a duty under the guise

of a tort claim for wrongful discharge in violation of public policy.

This court adopted the public policy tort as a "narrow exception" to the rule that an employment contract of indefinite duration may be terminated at will by either the employer or the employee. *Thompson v. St. Regis Paper Co.*, 102 Wn.2d 219, 233, 685 P.2d 1081 (1984). "[T]he essence of a wrongful discharge tort action is that the employer has intentionally wronged the employee." *Wilmot v. Kaiser Aluminum & Chem. Corp.*, 118 Wn.2d 46, 74, 821 P.2d 18 (1991). Importantly, the public policy tort is an intentional tort.

The public policy tort exception to the at-will doctrine is not a vehicle by which this court may conscript employers to shoulder the burden of a societal problem. Rather, the purpose of the exception is to prevent an employer from using the power of discharge to shield itself from liability for wrongful conduct. *Smith v. Bates Technical Coll.*, 139 Wn.2d 793, 801, 991 P.2d 1135 (2000). *See generally* Lawrence E. Blades, *Employment at Will vs. Individual Freedom: On Limiting the Abusive Exercise of Employer Power*, 67 Colum. L. Rev. 1404 (1967). The elements of a public policy tort are (1) the existence of a clear public policy (the clarity element), (2) discouraging the conduct in which the employee engaged would jeopardize the public policy (the jeopardy element), (3) the employer discharged the employee as a result of the policy-linked conduct (the causation element), and (4) no overriding justification supports the discharge (the absence of justification element). *Korslund v. DynCorp Tri-Cities Servs., Inc.*,

156 Wn.2d 168, 178, 125 P.3d 119 (2005).

The question certified by the district court is whether existing public policy clearly forbids an employer from discharging an employee because she experienced domestic violence and took leave from work "to protect herself, her family, and to hold her abuser accountable." This question implicates the first two elements: clarity and jeopardy. The lead opinion reformulates the certified question to address only clarity because it mistakenly believes jeopardy is solely a question of fact.

The threshold issue of law for a court to decide is whether a "clear mandate of public policy" forbids an employer from discharging an employee for a particular reason. *Thompson*, 102 Wn.2d at 232. This threshold issue spans the clarity and jeopardy elements of the four-part test we adopted in *Gardner v. Loomis Armored, Inc.*, 128 Wn.2d 931, 941, 913 P.2d 377 (1996); *Hubbard v. Spokane County*, 146 Wn.2d 699, 709 n.16, 50 P.3d 602 (2002). "Clarity" involves an analysis of the clarity and importance of the public policy at issue. The clarity inquiry is simply whether "any public policy exists whatsoever," regardless of its link to the employment relationship. *Gardner*, 128 Wn.2d at 941; *see also* Henry H. Perritt, Jr., *Employee Dismissal Law & Practice* § 7.04, at 7-25 (5th ed. 2007). "Jeopardy" involves an analysis of the extent to which allowing an employer to dismiss an employee for a particular reason would contravene that public policy. *Gardner*, 128 Wn.2d at 941-42; Perritt, *supra*, § 7.06, at 7-66.

Clarity is purely a question of law while jeopardy is a mixed question of law and fact.

When a statute expressly relates to the employment context, the question whether a "clear mandate of public policy" forbids discharge for a particular reason requires us to go no further than the statute itself in addressing this threshold issue. Perritt, *supra*, § 7.05[B], at 7-52 to -53. Examples include statutes forbidding discrimination in the workplace, providing protected leave to employees, and guaranteeing safe working conditions and fair wages. *See, e.g., Roberts v. Dudley*, 140 Wn.2d 58, 993 P.2d 901 (2000) (statute and preexisting case law forbid employers from engaging in sex discrimination); *Smith*, 139 Wn.2d 793 (statutes provide grievance procedures for public employees and make it an unfair employment practice to retaliate against an employee for filing a grievance); *Bravo v. Dolsen Cos*., 125 Wn.2d 745, 888 P.2d 147 (1995) (statute forbids employers from interfering with employees' concerted activities); *Hume v. Am. Disposal Co*., 124 Wn.2d 656, 880 P.2d 988 (1994) (statute forbids employer retaliation against employees who assert right to overtime pay); *Wilmot*, 118 Wn.2d 46 (statute forbids employment discrimination against employees who file a worker's compensation claim); *Bennett v. Hardy*, 113 Wn.2d 912, 784 P.2d 1258 (1990) (statute defines age discrimination as an unfair employment practice).

In such instances, the legal component of the jeopardy analysis is whether the remedies provided by the legislature adequately protect the public policy. *See,*

e.g., *Korslund*, 156 Wn.2d at 181 (concluding, as a matter of law, comprehensive statutory remedies against retaliation for reporting safety violations in nuclear industry adequately protects relevant public policy interests); *compare Smith*, 139 Wn.2d at 805 (finding statutory remedies for wrongful discharge for filing a grievance inadequate where no recovery for emotional distress is available). However, when a statute does not directly address the employment relationship, a court must consider the clarity and jeopardy elements simultaneously, analyzing the nexus between the public policy and the workplace dispute to determine whether an important public policy would be jeopardized by permitting employee dismissals under the factual circumstances alleged. *See Gardner*, 128 Wn.2d at 946 (analyzing whether allowing employers to discharge employees for violating a work rule when necessary to save a life would contravene public policy favoring lifesaving activity).[1] The resolution of this issue defines the scope of protected conduct, and is a question of law for the court. *See* Henry H. Perritt, Jr., *The Future of Wrongful Dismissal Claims: Where Does Employer Self Interest Lie?*,

[1] In *Gardner*, the majority inferred a "fundamental" public policy in favor of saving persons from life threatening situations from the emergency exception to the warrant requirement, recognition of self-defense as a defense to homicide, and the necessity defense to all other criminal charges. Specialists in the field point to *Gardner* as an anomaly in that the sources of law relied upon for the public policy impose no duty on either the employer or the employee to engage in, or refrain from, the conduct at issue. *See, e.g.,* Deborah A. Ballam, *Employment-at-Will: The Impending Death of a Doctrine*, 37 Am. Bus. L.J. 653, 671-72 (2000) (observing that the *Gardner* decision represents a "dramatic change in the existing precedent defining public policy for purposes of the wrongful discharge tort" and suggesting that it is "an anomaly based on unusual circumstances").

58 U. Cin. L. Rev. 397, 401-02 (1989) ("Judges, not juries, decide what is public policy and what kind of jeopardy can occur if specific types of employee conduct are chilled by the threat of dismissal . . . . The jury decides only the actual questions of what conduct the employee engaged in and what the employer's motivation was."). Once a court decides the scope of protected conduct, it is for the jury to determine the factual issue whether the employee actually engaged in the protected conduct (the factual component of jeopardy) and whether the dismissal was motivated by the employee's protected conduct (causation). Allocating the determination of the scope of protected conduct to the court is necessary to provide appropriate notice of the kind of conduct that would subject employers to liability, as allowing juries to decide, on a case by case basis, the scope of protected conduct would result in inconsistent and unpredictable outcomes. Henry H. Perritt, Jr., *The Future of Wrongful Dismissal Claims: Where Does Employer Self Interest Lie?*, 58 U. Cin. L. Rev. 397, 401 ("The judge ought to decide the clarity and jeopardy elements, both of which involve relatively pure law and policy questions in the abstract . . . [m]ost courts . . . have adopted the view that the judge decides what public policy is and what kind of conduct is necessary to realize the public policy.")

In this case, no applicable statute, constitutional provision, administrative regulation, or other source of public policy cited by the lead opinion directly addresses whether, and to what extent, public policy limits a private employer's

power to discharge an employee who experiences domestic violence. We have recognized a court may infer a public policy mandate from tangentially related constitutional and statutory provisions even in the absence of a direct expression of public policy. *Gardner*, 128 Wn.2d at 946.

For example, in *Gardner*, an armored truck company discharged an employee for violating a work rule that prohibited him from leaving the truck while his companion was making a pickup or delivery. The employee violated the rule in order to rescue a person who was fleeing from an armed bank robber. To determine whether the discharge violated a clear mandate of public policy, this court first addressed the clarity element, finding a clear public policy in favor of saving persons from life-threatening situations. This court then considered whether that public policy would be jeopardized by allowing an employer to enforce its work rule by discharging an employee under such circumstances. *See Gardner*, 128 Wn.2d at 948-49 ("This court must balance the public policies raised by Plaintiff against Loomis' legitimate interest in maintaining a safe workplace and determine whether those public policies outweigh Loomis' concerns."). After balancing the competing interests involved, this court concluded society's interest in encouraging heroic life-saving activity was paramount, requiring the employer to subordinate its own interest in strict compliance with the work rule.

As apparent in *Gardner*, when the source of public policy does not itself

address the employment relationship, a court must balance an employer's interest in operating its business as it sees fit, an employee's interest in job security, and society's interest in the protection of public policies to decide whether a clear mandate of public policy forbids an employer from discharging an employee for a particular reason. In striking this balance, a court must act with the greatest restraint to avoid intruding on the legislative prerogative of creating public policy or unfairly subjecting employers to liability for conduct they did not know was wrongful. *See Korslund*, 156 Wn.2d at 180 (narrow construction rule applies most forcefully to the identification of a clear mandate of public policy).

"Public policy" is an amorphous concept. Virtually every statute embodies a public policy. However, for purposes of defining the scope of an employer's liability for wrongful discharge, the public policy should be "clear" in the sense that it provides specific guidance to the employer. *Thompson*, 102 Wn.2d at 232 (emphasis omitted) (quoting *Parnar v. Americana Hotels, Inc.*, 65 Haw. 370, 380, 652 P.2d 625 (1982)). "An employer should not be exposed to liability where a public policy standard is too general to provide any specific guidance or is so vague that it is subject to different interpretations." *Birthisel v. Tri-Cities Health Servs. Corp.*, 188 W. Va. 371, 377, 424 S.E.2d 606 (1992). Thus, the public policy should be clear enough to put the employer on notice that discharging an employee for a particular reason would be wrongful.[2] *Id*. at 377 (noting that an

[2] Perritt analogizes the "clear mandate" requirement to the "duty" element of a negligence

inherent aspect of the clarity of a public policy is "that the policy will provide specific guidance to a reasonable person"); *Stevenson v. Superior Court*, 16 Cal. 4th 880, 889, 941 P.2d 1157, 66 Cal. Rptr. 2d 888 (1997) ("tethering public policy to specific constitutional or statutory provisions serves . . . to ensure that employers have adequate notice of the conduct that will subject them to tort liability to the employees they discharge").

We have recognized four general categories of cases that justify the imposition of tort liability: where an employer discharges an employee for (1) refusing to commit an illegal act,[3] (2) performing a public duty,[4] (3) exercising a legal right or privilege,[5] or (4) reporting an employer's illegal activity.[6] In such cases, the employee's interest in job security and society's interest in the fulfillment of public policies outweigh the employer's interest in controlling

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case, both of which describe the defendant's legal obligation to the plaintiff. *See* Perritt, *supra*, § 7.05 n.100. In addressing only whether there is a public policy to prevent domestic violence, this court has only partially answered the critical threshold question of the employer's responsibilities in relation to the public policy at issue.

[3] *Hubbard*, 146 Wn.2d 699 (insisting on compliance with county zoning and building codes); *Ellis v. City of Seattle*, 142 Wn.2d 450, 13 P.3d 1065 (2000) (refusal to violate a fire code); *Thompson*, 102 Wn.2d 219 (compliance with federal antibribery statute).

[4] *Gardner*, 128 Wn.2d 931 (lifesaving activity); *Gaspar v. Peshastin Hi-Up Growers*, 131 Wn. App. 630, 128 P.3d 627 (2006) (cooperation with a police investigation of illegal activity by co-worker).

[5] *Smith*, 139 Wn.2d 793 (exercising right to file a grievance against an employer); *Roberts*, 140 Wn.2d 58 (opposition to sex discrimination); *Bravo*, 125 Wn.2d 745 (exercising statutory right to engage in concerted organizing activities); *Hume*, 124 Wn.2d 656 (asserting statutory right to overtime pay); *Wilmot*, 118 Wn.2d 46 (filing a worker's compensation claim).

[6] *Korslund*, 156 Wn.2d 168 (reporting alleged violation of federal hazardous waste regulations); *Bennett*, 113 Wn.2d 912 (opposition to age discrimination practices); *Dicomes v. State*, 113 Wn.2d 612, 782 P.2d 1002 (1989) (governmental misconduct).

personnel decisions. We reasonably expect employers to recognize that discharging an employee for such socially undesirable reasons will expose them to liability for wrongful discharge.

In her complaint, Danny alleges her employer discharged her for "hold[ing] her abuser accountable" (complaint at 6), in violation of a clear public policy that favors "utilizing the state's legal system to obtain protection and to hold abusers accountable." *Id*. at 5. She further alleges her employer discharged her for "[taking] actions to protect herself [and] her family," in violation of "a clear public policy encouraging domestic violence victims to seek alternative living arrangements and social services." *Id*. at 6.

As discussed in the lead opinion, Washington has clearly existing public policies to prevent crimes of domestic violence, protect the victims of domestic violence, and prosecute its perpetrators. These public policies are particularly jeopardized by the chilling effect the threat of dismissal could have on employees who experience domestic violence. Domestic violence is unlike most crimes in that its victims are often reluctant to report the crime or seek help to escape the perpetrator, due to fear, shame, or economic dependence. Employers may be expected to recognize they may not penalize employees for seeking legal recourse against the perpetrators of domestic violence or for accessing social services as doing so would thwart clearly existing public policies to prevent domestic violence, protect the victims of domestic violence, and effectively prosecute its

perpetrators. In view of the importance of the public policies at issue, and the employer's minimal interest in discharging a person for engaging in such conduct, I agree that public policy clearly prohibits employers from discharging an employee for obtaining a protection order, filing a complaint against an abuser, cooperating with the investigation and prosecution of the alleged abuser, finding alternative living arrangements, or accessing support services for domestic violence victims.

But nothing in the sources of public policy cited by the lead opinion would have given an employer fair notice it may not discharge an employee for absenteeism resulting from domestic violence. Thus, I would hold that while an employer could not discharge an employee *because* he or she took such actions in response to domestic violence, before the legislature's enactment of Substitute House Bill 2602 no clear mandate of public policy prohibited an employer from discharging an employee who missed work or was unable to carry out his or her job functions as a result of domestic violence.

Discharge for absenteeism must be differentiated from discharge for the conduct underlying the absenteeism. In *Wilmot*, 118 Wn.2d at 75, this court recognized this distinction in the context of a wrongful discharge claim alleging an employer discharged an employee for filing a worker's compensation claim. In response to a certified question, we held that discharging an employee due to absenteeism resulting from a compensable injury does not, in and of itself, violate

public policy absent evidence the filing of a worker's compensation claim was a significant factor in the decision.

The protected conduct in *Wilmot* was obtaining worker's compensation benefits. We observed that some courts define the protected conduct more expansively, to encompass an employee's absence from work due to the compensable injury. We rejected that approach, noting, "the essence of a wrongful discharge tort action is that the employer has intentionally wronged the employee." *Id*. at 74; *see also Thompson*, 102 Wn.2d at 232 (employee must demonstrate the discharge may have been "motivated by reasons that contravene a clear mandate of public policy"). This requires proof of the employer's "illegal motive." *Wilmot*, 118 Wn.2d at 74. Although employers may not retaliate against employees for exercising their right to file a worker's compensation claim, nothing restrains employers from discharging employees because they are unable to perform their job functions as a result of a work-related injury.[7]

As in *Wilmot*, this court should clarify that under the law applicable to this case, an employee's protected conduct does not encompass taking time off work. Prior to the enactment of Substitute House Bill 2602, employers did not have a statutory or common law duty to grant leave to an employee for purposes of addressing domestic violence issues, except to the extent the Family Medical

[7] *Wilmot* was decided before the enactment of the Family Medical Leave Act of 1993, 29 U.S.C. §§ 2601, 2612(a)(1)(D), which requires employers to grant up to 12 weeks of leave per year when a qualified employee is unable to work due to a medical condition.

Leave Act of 1993 (FMLA) (29 U.S.C. § 2601) applied. Because an employer was not required to grant leave to domestic violence victims, "there should be no per se rule that a discharge for absenteeism is an illegal reason for the discharge," *Wilmot*, 118 Wn.2d at 74, when an employee took leave in order to address issues of domestic violence. Until our legislature affirmatively granted protected leave to domestic violence victims in the most recent legislative session, discharging an employee for taking such leave was not an illegal motive except to the extent it contravened an employee's right to protected leave under other applicable legislation, such as the FMLA.[8]

In limited cases, an employee's performance of a public duty may require an employer to excuse an employee's absenteeism even in the absence of any express statutory or contractual requirement. In view of the importance of the jury system, and the need for diverse representation on juries, some courts have inferred a public policy mandate against discharging employees for missing work to perform jury service. *Ness v. Hock*, 272 Or. 210, 536 P.2d 512 (1975); *Shaffer v. Frontrunner, Inc.*, 57 Ohio App. 3d 18, 566 N.E.2d 193 (1990). An employer who refuses to allow an employee to miss work in order to serve on a jury places the employee in the "untenable position of choosing between his employment and [a statutorily] mandated duty." *Shaffer*, 566 N.E.2d at 196.

[8] Of course, if an employer asserts the discharge was the result of absenteeism rather than retaliation for accessing legal or social services to remedy the domestic violence, an employee may demonstrate the proffered motive is pretextual.

Similarly, courts have concluded public policy requires employers to excuse employees who miss work to respond to compulsory process, such as a subpoena. *Dunwoody v. Handskill Corp*., 185 Or. App. 603, 60 P.3d 1135 (2003) (discharge for missing work to testify at murder trial violates public policy); Courts reason that allowing employers to discharge employees who miss work in order to fulfill jury duty or respond to legal summons would intolerably undermine the effective operation of our judicial system. *Ness*, 536 P.2d at 516. Accordingly, absent an overriding justification for the discharge, courts have determined employers may be held liable for wrongful discharge in such circumstances.

In contrast, as noted earlier, neither the parties nor my research has uncovered any case where a court has held an employer liable for wrongful discharge based on *absenteeism* where the employee is absent in order to report a crime, cooperate with law enforcement, or assist in the prosecution of a criminal offense. *Compare Gaspar v. Peshastin Hi-Up Growers*, 131 Wn. App. 630, 128 P.3d 627 (2006) (discharge in retaliation for cooperating with a police investigation violates public policy); *Little v. Windemere Relocation, Inc.*, 301 F.3d 958 (9th Cir. 2001) (discharge in retaliation for reporting being raped during a business lunch with the employer's client); *Ludwick v. This Minute of Carolina, Inc.*, 287 S.C. 219, 337 S.E.2d 213 (1985) (discharge in retaliation for complying with a subpoena to testify at administrative hearing on alleged employer

misconduct violates public policy); *Wiskotoni v Mich. Nat'l Bank-W*., 716 F.2d 378 (6th Cir. 1983) (discharge in retaliation for testifying before a grand jury investigating co-worker's alleged wrongdoing violates public policy).

In requiring employers to excuse any absenteeism an employee requires as a result of domestic violence, the lead opinion stretches the scope of protected conduct far beyond what this or any other court has ever recognized. Contrary to the lead opinion, *Gardner* does not support its result. The lead opinion finds Danny's situation comparable to Gardner's in that it involved "leaving work for a period of time in an effort to further a clearly established public policy. If her actions were necessary to further the public policy, as the truck driver's actions were in *Gardner*, her conduct is protected." Lead opinion at 28. The comparison between Danny and Gardner is inapt. We decided Gardner's conduct was protected because we concluded, as a matter of law, his employer had a duty to subordinate its interest in strict compliance with the work rule when necessary to save a life. *Gardner* did not involve absenteeism. Rather, *Gardner* stands for the proposition an employer can fairly be held liable for insisting on compliance with a work rule when doing so conflicts with the paramount public good of rescuing a person in mortal danger. *Gardner*, 128 Wn.2d at 950-51 (Guy, J., concurring) (stating employer's action was contrary to "human nature," as "any decent person" would choose to break a work rule in order to save a life). It certainly does not stand for the proposition that an employer has a duty to excuse any absenteeism an

employee needs for the purpose of engaging in public policy-promoting conduct.

Contrary to the lead opinion, I would not "decide as a matter of law that time off work is never necessary to prevent domestic violence." Lead opinion at 26. Rather, I reject the proposition an employee's *need for leave* is an appropriate criterion for deciding the scope of an employer's common law duty to excuse absenteeism resulting from domestic violence. The lead opinion would decide as a matter of law that employers must excuse employee absenteeism whenever an employee needs leave to perform activities that further the general public policies of preventing domestic violence and assisting the victims of domestic violence. Moreover, the lead opinion would decide this issue sub silentio, without expressly balancing the employer's interests in operating a business efficiently with society's interests in requiring an employer to provide leave time for victims of domestic violence to take steps necessary to address the violence. Rather, the lead opinion *assumes* the public policy of preventing domestic violence requires employers to excuse employee absenteeism, leaving only a fact question for the jury as to whether time off from work was reasonably necessary under the circumstances. The lead opinion does not explain why employers should bear the burden of accommodating an employee's needs when it has no statutory or contractual obligation to do so and otherwise lacks notice that failing to grant leave constitutes a legal wrong.

Moreover, the lead opinion offers no principled basis for limiting its

holding to the needs of domestic violence victims, as opposed to the needs of crime victims generally, or, even more broadly, the needs of an employee who wishes to exercise some other right conferred by the legislature. In my view, an employer's refusal to grant leave in such circumstances does not jeopardize public policy so as to warrant the imposition of liability for wrongful discharge. To hold otherwise places an employer in the untenable position of having to guess whether a court or jury will agree the employee's absence was reasonably necessary whenever an employee misses work in order to exercise a legal right.

Whether to provide victims of domestic violence with protected leave so they may obtain protection orders, participate in criminal prosecutions, and access social services is a policy decision for the legislature. In the most recent legislative session our legislature joined the ranks of those states that have enacted legislation providing the protection the petitioners here seek. S.B. Rep. on S.B. 5900, at 2, 60th Leg., Reg. Sess. (Wash. 2007) (noting 34 other states provide similar protection).

The lead opinion downplays the significance of the legislature's action, stating, "though the legislature had not yet considered such a bill at the time of Danny's discharge, the fundamental public policy underlying the bill had long been established at that time." Lead opinion at 22. In fact, the legislature enacted Substitute House Bill 2602 after having considered the issue in three legislative sessions. *See* S.B. 5900, 59th Leg., Reg. Sess. (Wash. 2007) (providing

employment leave for domestic violence victims); S.B. 5329, 57th Leg., Reg. Sess. (Wash. 2001) (providing employment leave for all crime victims, including domestic violence victims). Apparently impatient with the legislative process, the lead and concurring opinions would accomplish by judicial fiat what properly is a matter for the policy-making branch of government. As revealed by the statutes enacted by our legislature and other states, the issue of employment leave for domestic violence victims raises a number of practical considerations best left to legislative action.

The legislature is better equipped to balance the competing interests involved and create a specific statutory framework that provides adequate notice as to the amount of protective leave, which employers are subject to the leave, whether leave must be paid or unpaid, whether the leave is in addition to or cumulative of that available under the FMLA, whether notice is required, and the nature of the activities that are protected. These are policy decisions for the legislature, not this court.

Legislatures that have addressed the issue have formulated a wide variety of responses to these questions.[9] *See, e.g.*, California (Cal. Lab. Code §§ 230,

[9] Substitute House Bill 2602 enacted by our legislature provides relatively expansive protection for domestic violence victims. It contains no small employer exemption, entitles employees who experience domestic violence to take "reasonable leave" to seek legal, medical, and social services, with appropriate notice to employers, requires employers to restore employees to their original position, with no loss of benefits, prohibits employers from taking any adverse employment actions against employees who exercise their statutory privileges, and provides remedies for violations.

230.1); Colorado (Colo. Rev. Stat. § 24-34-402.7); Hawaii (Haw. Rev. Stat. § 378-72); Illinois (820 Ill. Comp. Stat. 180/1-180/45); Maine (26 Me. Rev. Stat. § 850); New York (N.Y. Penal Law § 215.14); North Carolina (N.C. Gen. Stat. 95-270a).

The lead opinion finds no significance in the fact our legislature has twice considered and declined to enact legislation that would have provided the protection the petitioners seek. *See* Substitute S.B. 5900, at 2, 60th Leg., Reg. Sess. (Wash. 2007). The lead opinion cites case law for the proposition we cannot infer legislative intent from the failure to enact legislation. However, legislative inaction is significant in the context of a public policy tort claim where the proposed legislation would have established a previously unrecognized public policy. *Sedlacek v. Hillis*, 145 Wn.2d 379, 391-92, 36 P.3d 1014 (2001). The legislature's failure to enact the legislation would have no consequence if other sources of public policy clearly put employers on notice that discharging an employee for a particular reason is wrongful, but that is not the situation presented. *Compare Roberts*, 140 Wn.2d at 69 n.9 (failure of proposed legislation that would have removed the small employer exemption from Washington Law Against Discrimination, chapter 49.60 RCW, "does not signify any *retraction* of a more fundamental public policy against wrongful discrimination in the workplace," as evidenced in preexisting statutes and case law forbidding sex discrimination in the workplace (emphasis added)). Before the legislature enacted Substitute House Bill 2602, nothing gave employers fair notice of a legal duty to

excuse employee absenteeism resulting from domestic violence.

Conclusion

While purporting to decide only that Washington has established a clear public policy mandate to prevent domestic violence and prosecute its perpetrators, the lead opinion actually creates a public policy mandate requiring employers to excuse employee absenteeism related to domestic violence. I would hold public policy clearly forbids employers from discharging employees because of their status as domestic violence victims, or because they report the crime, cooperate in the criminal investigation and prosecution of the abuser, obtain a protection order, seek alternative living arrangements, or access medical or social services for domestic violence victims. However, before the legislature enacted Substitute House Bill 2602, there was no basis for inferring that public policy clearly forbids employers from discharging employees for absenteeism resulting from domestic violence.

AUTHOR:
Justice Barbara A. Madsen

WE CONCUR:

Justice Charles W. Johnson